Azizan bin Yahaya v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO K-05–485 OF 2010
SYED AHMAD HELMY,APANDI ALI AND AZIAH ALI JJCA
13 JULY 2012

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Criminal Procedure — Appeal — Trial judge's findings — Whether judge failed to make affirmative finding of possession to invoke statutory presumption of drug trafficking — Whether judge failed to consider other persons had access to room and drawer where drugs were found — Whether mere fact drugs were found in drawer on accused's side of bed sufficient to create inference he had exclusive custody and control of drugs — Whether prosecution failed to prove case beyond reasonable doubt — Whether defence should not have been called

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The appellant ('accused') was convicted and sentenced to death by the High Court for trafficking in 1,147.3g cannabis under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). According to the prosecution's evidence a police party went to the accused's house very early one morning and after getting the occupants to let them in, the party searched the main bedroom on the upper floor of the house where the accused and his wife, SP4, slept. The house was also occupied by the couple's three children aged 16, 20 and 24 years. From an unlocked drawer at the headboard of the accused's bed the party recovered a plastic bag, P8, which contained cannabis. Without searching the other rooms occupied by the children, the police party arrested the accused and his wife and took them to the police station with the seized drugs. SP4 was released after eight days of remand and only the accused was charged with the offence. At the end of the prosecution's case, the trial judge held a prima facie case had been proved against the accused since the finding of the drugs in the drawer of his bedstead showed he had custody and control of the drugs and the main bedroom was used only by him and his wife. In his defence the accused denied any knowledge of P8 or of the drugs. He said he did not know to whom they belonged. His main bedroom, he said, was normally unlocked and his children had access to the room. The trial judge held the defence's story was a mere denial and failed to raise a reasonable doubt on the prosecution's case. The judge also remarked in his grounds of judgment that the accused's demeanour while giving evidence was 'suspicious'. In his appeal to the Court of Appeal against the conviction and sentence, the accused said the trial judge had erred in (i) failing to consider SP4's evidence that the main bedroom was accessible to members of the whole family (ii) finding, without any valid reason, that his demeanour when testifying raised suspicion and (iii) failing to make an affirmative finding of possession.

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Held, allowing the appeal, setting aside the conviction and sentence and acquitting and discharging the accused:

(1) Though the room where the drugs were found was occupied only by the accused and SP4, the evidence showed it was accessible to all the other occupants in the house. The trial judge had failed to analyse or assess the testimonies of SP4 and SP5 in this regard. The prosecution had failed to discharge its duty of excluding access to the accused's room by others (see paras 8–9).

(2) The trial judge also failed to consider that the prosecution had failed to exclude the possibility that other persons could have had access to the drawer where the drugs were found. The onus was not on the defence to prove the possibility of access to the drawer by others (see para 16).

(3) The High Court did not specifically make a finding of actual possession for the invocation of the presumption of trafficking under s 37(da) of the DDA. In the absence of other incriminating evidence against the accused, the mere fact the drugs were found in the drawer on the accused's side of the bed was insufficient for the trial judge to infer the accused had exclusive custody and control over P8. The judge's failure to properly consider and evaluate the evidence coupled with his failure to make an affirmative finding of possession was a serious misdirection (see para 17).

(4) The trial judge did not assess or test the defence by comparing it with the prosecution's evidence to conclude the defence had failed to cast a reasonable doubt on the prosecution's case. Had the judge properly evaluated the prosecution's evidence he would have found it had failed to prove beyond reasonable doubt that the accused had custody and control of P8 for the presumption under s 37(da) of the DDA to be invoked. The accused ought not to have been called upon to enter his defence (see paras 19–20).

(5) No reasons were given in the grounds of judgment for the trial judge to conclude the accused's demeanour was 'suspicious'. The finding on the accused's demeanour was a factor that weighed on the judge's decision to convict but it was a finding that was arrived at with no supportive reasons. The absence of reasons raised the possibility the judge may not have considered the weight of the evidence and the possibilities of the case in coming to his ultimate decision (see paras 12–13).

[Bahasa Malaysia summary

Perayu ('tertuduh') telah disabitkan kesalahan dan dijatuhkan hukuman mati oleh Mahkamah Tinggi kerana mengedar 1,147.3g ganja di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Menurut keterangan pendakwaan, anggota polis telah ke rumah tertuduh awal suatu pagi dan selepas meminta

penghuni-penghuni rumah tersebut membenarkan mereka masuk, anggota polis menggeledah bilik tidur utama di tingkat atas rumah di mana tertuduh dan isterinya, SP4, tidur. Rumah tersebut juga dihuni oleh tiga orang anak pasangan tersebut yang berusia 16, 20 dan 24 tahun. Daripada laci yang berkunci di kepala katil tertuduh, anggota polis menjumpai beg plastik, P8, yang mengandungi ganja. Tanpa menggeladah bilik-bilik lain yang diduduki oleh anak-anak, anggota polis menahan tertuduh dan isterinya dan membawa mereka ke balai polis dengan dadah yang dirampas. SP4 telah dibebaskan selepas ditahan reman selama lapan hari dan hanya tertuduh yang didakwa dengan kesalahan tersebut. Di akhir kes pendakwaan, hakim bicara memutuskan kes prima facie telah dibuktikan terhadap tertuduh kerana pemerolehan dadah dalam laci tempat tidurnya menunjukkan bahawa dia mempunyai jagaan dan kawalan dadah dan bilik tidur utama hanya digunakan olehnya dan isterinya. Dalam pembelaannya tertuduh menafikan sebarang pengetahuan P8 atau dadah tersebut. Dia menghujahkan bahawa dia tidak mengetahui milik siapakah dadah tersebut. Bilik tidur utama, menurutnya, kebiasaannya tidak dikunci dan anak-anaknya mempunyai akses ke bilik tersebut. Hakim bicara memutuskan bahawa cerita pembelaan adalah penafian semata-mata dan gagal menimbulkan keraguan munasabah ke atas kes pendakwaan. Hakim juga memutuskan dalam alasan penghakimannya bahawa perilaku tertuduh semasa memberi keterangan 'mencurigakan'. Dalam rayuan kepada Mahkamah Rayuan terhadap sabitan dan hukuman, tertuduh menghujahkan bahawa hakim bicara telah terkhilaf dalam (i) gagal mempertimbangkan keterangan SP4 bahawa bilik tidur utama boleh diakses oleh kesemua ahli keluarga (ii) dapatan, tanpa apa-apa sebab yang sah, bahawa perilakunya ketika memberi keterangan mencurigakan dan (iii) kegagalan untuk membuat dapatan afirmatif mengenai milikan.

Diputuskan, membenarkan rayuan, mengetepikan sabitan dan hukuman dan membebaskan dan melepaskan tertuduh:

(1) Walaupun bilik di mana dadah tersebut ditemui hanya diduduki oleh tertuduh dan SP4, bukti menunjukkan bahawa ia boleh diakses oleh semua penghuni-penghuni lain di dalam rumah. Hakim bicara telah gagal untuk menganalisa atau menilai keterangan SP4 dan SP5 dalam hal ini. Pihak pendakwaan telah gagal untuk melaksanakan tugas untuk mengecualikan akses kepada bilik tertuduh tersebut oleh orang lain (lihat perenggan 8-9).

(2) Hakim bicara juga gagal mempertimbangkan bahawa pihak pendakwaan telah gagal untuk mengecualikan kemungkinan bahawa orang lain boleh mempunyai akses kepada laci di mana dadah tersebut ditemui. Tanggungjawab bukan atas pembelaan untuk membuktikan kemungkinan akses kepada laci oleh orang lain (lihat perenggan 16).

(3) Mahkamah Tinggi tidak secara khususnya membuat dapatan milikan

A sebenar bagi pemakaian anggapan pengedaran di bawah s 37(da) ADB. Dalam ketiadaan keterangan lain membabitkan tertuduh, fakta setakat dadah telah dijumpai di dalam laci di sebelah katil tertuduh adalah mencukupi untuk hakim bicara membuat kesimpulan bahawa tertuduh mempunyai jagaan dan kawalan eksklusif ke atas P8. Kegagalan hakim
B untuk mempertimbangkan dan menilai bukti yang ditambah dengan kegagalan untuk membuat dapatan milikan secara afirmatif adalah satu salah arah yang serius (lihat perenggan 17).

(4) Hakim bicara tidak menilai atau menguji pembelaan dengan membandingkan ia dengan bukti pendakwaan untuk membuat
C kesimpulan bahawa pihak pembelaan telah gagal menimbulkan keraguan munasabah ke atas kes pendakwaan. Sekiranya hakim telah menilai keterangan pendakwaan dengan betul, beliau akan mendapati bahawa ia telah gagal membuktikan melampaui keraguan munasabah bahawa tertuduh mempunyai jagaan dan kawalan P8 bagi membolehkan
D anggapan di bawah s 37(da) ADB dibangkitkan. Tertuduh tidak sepatutnya dipanggil untuk memasukkan pembelaannya (lihat perenggan 19 dan 20).

(5) Tiada alasan diberikan dalam alasan penghakiman hakim bicara
E menyimpulkan perilaku tertuduh adalah 'mencurigakan'. Dapatan pemerhatian tentang perilaku tertuduh adalah satu faktor yang dipertimbangkan atas keputusan hakim untuk mensabitkan tetapi ia adalah suatu dapatan yang dicapai tanpa sebarang alasan-alasan yang menyokong. Ketiadaan alasan-alasan membangkitkan kemungkinan
F hakim mungkin tidak mempertimbangkan berat bukti dan kemungkinan kes tersebut dalam mencapai keputusan muktamadnya (lihat perenggan 12 dan 13).]

Notes

G For cases on trial judge's findings, see 5(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 867–869.

Cases referred to

Balasingham v PP [1959] 1 MLJ 193 (refd)
H *DA Duncan v PP* [1980] 2 MLJ 195, FC (refd)
Dato' Seri Anwar Ibrahim v PP [2010] 6 MLJ 585; [2010] 9 CLJ 625, FC (refd)
Ibrahim Mohamad & Anor v PP [2011] 4 CLJ 113, FC (refd)
Khoon Chye Hin v PP [1961] 1 MLJ 105b, CA (refd)
Leow Nghee Lim v Reg [1956] MLJ 28; [1955] 1 LNS 53 (refd)
I *Low Kian Boon & Anor v PP* [2010] 4 MLJ 425 ; [2010] 5 CLJ 489, FC (refd)
Magendran a/l Mohan v PP [2011] 6 MLJ 1; [2011] 1 CLJ 805, FC (refd)
Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169; [1991] 3 CLJ 2073; [1991] 1 CLJ 311 (Rep), SC (refd)
PP v Ling Tee Huah [1982] 2 MLJ 324, HC (refd)

Shah Rizan bin Sulong lwn Pendakwa Raya [2012] MLJU 356; [2012] MLRA 270, CA (refd)
Teoh Hoe Chye v PP; Yeap Teong Tean v PP [1987] 1 MLJ 220; [1987] CLJ (Rep) 386, SC (refd)
Ti Chuee Hiang v PP [1995] 2 MLJ 433; [1995] 3 CLJ 1, SC (refd)

Legislation referred to

Criminal Procedure Code ss 182A, 308
Dangerous Drugs Act 1952 ss 2, 37(da), 39B(1)(a)

Appeal from: Criminal Trial No 45A–28 of 2009 (High Court, Alor Setar)

Ahmad Nizam bin Mohamed (Nizam & Rofi) for the appellant.
Aslinda bt Ahad (Attorney General's Chambers) for the respondent.

Aziah Ali JCA (delivering judgment of the court):

[1] The appellant Azizan bin Yahaya was charged with trafficking in 1,147.3g of cannabis under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). He was found guilty and convicted by the Alor Setar High Court and was sentenced to death. The appellant appealed to this court against his conviction and sentence. We heard the appeal and unanimously allowed his appeal and set aside the conviction and sentence.

[2] Briefly the evidence adduced by the prosecution was that on 15 June 2008 at about 3.15am a police party led by SP5, Insp Faroukh Fasha bin Basharudin went to house No 1154 Taman Bersatu, Jalan Kuala Kedah, Alor Setar which was occupied by the appellant, his wife (SP4) and their three children. SP5 said he identified themselves as police and requested the appellant's son Mohd Azman bin Azizan, who was sleeping in the living room, to open the door which he did. Mohd Azman led SP5 and four of his team members to the main bedroom on the upper floor of the house. SP5 said he opened the room door which was unlocked and found the appellant asleep with his wife (SP4) on the bed. Both the appellant and SP4 were searched outside the room but nothing was found on them. They were then taken back into the room and according to SP5 the room was searched in the presence of the appellant and SP4. From a drawer ('laci') in the headboard of the bed above where the appellant slept (see p 121 appeal record) D/SM Samsudin found a white plastic bag bearing the word 'Perodua' (P8) and inside the bag SP5 found an orange coloured plastic bag with the words 'terima kasih'. In the orange plastic bag SP5 found a compact block of dried plant material suspected to be cannabis. SP5 also found a blue coloured plastic bag inside which was dried plant material also suspected to be cannabis wrapped in plastic and yellow cellotape. Nothing else was recovered upon a further search of the room. No

search was done on the other two rooms which were occupied by the appellant's children aged 16, 20 and 24 years respectively. Both the appellant and SP4 were arrested and were then taken to the police station. SP4 was released after being remanded for eight days. SP5 took the suspected cannabis recovered from the room and kept them with him at the district police headquarters. He also made a search list (P14) and lodged a police report (P15). SP3 the chemist who prepared the report (P6) testified that upon her analysis she found that the materials handed over to her by SP6 ASP Balachandran were cannabis as defined under s 2 of the Act.

[3] At the end of the prosecution's case the learned High Court judge in his grounds of judgment stated that two issues had to be determined (p 89 appeal record) ie:

Isu-lsu Yang Perlu Diputuskan Pi Akhir Kes Pendakwaan

(1) Adakah tumbuhan kering itu dadah berbahaya?

(2) Adakah Tertuduh mengedar Cannabis tersebut?

His Lordship made the following findings:

(1) Mengenai isu pertama, SP3 — Ahli kimia mengesahkan tumbuhan-tumbuhan kering itu adalah Cannabis seberat 1,154 gram. Cannabis adalah dadah berbahaya seperti yang ditakrifkan oleh s 2 Akta yang sama.

(2) Mengenai isu kedua, dari keterangan SP4, jelas dia tiada pengetahuan dengan dadah tersebut. Bilik utama itu digunakan oleh beliau dan tertuduh sahaja. Anak-anaknya duduk di bilik yang berasingan. Dadah itu ditemui di kepala katil tempat tidur tertuduh. Oleh itu, tertuduh mempunyai kawalan dan milikan terhadap dadah tersebut. Dengan itu, anggapan di bawah s 37(da)(vi) Akta Dadah Berbahaya 1952 terpakai terhadap tertuduh. Tertuduh dianggap mengedar dadah tersebut.

(3) Oleh itu, ada kes prima facie terhadap tertuduh dan Mahkamah memanggil tertuduh membela diri. Tertuduh memilih memberi keterangan secara bersumpah di kandang saksi selepas 3 pilihan diberi dan diterangkan kepadanya.

[4] In gist the appellant's defence was a denial of the charge. The appellant testified that it was normal for his room to be unlocked and his children had access to the room. He denied that his children would not enter his room without his permission. He denied ownership of the plastic bags and the contents. He further testified that he had no knowledge about the presence of the bags in the bed's headboard and did not know the owner of the bags and denied that he trafficked in the drugs found.

[5] At the end of the defence case the learned judge found as follows (pp 91–92 appeal record):

(1) Kes prima facie pendakwaan gagal disangkal oleh tertuduh;

(2) Pembelaan tertuduh adalah penafian semata-mata. Dalam kes *Public Prosecutor v Ling Tee Huah* [1982] 2 MLJ 324 di mukasurat 326, Mahkamah Tinggi memutuskan:

> 'a mere denial without proof to reasonably dislodge the prosecution evidence is not sufficient.'

Mahkamah Persekutuan dalam kes *DA Duncan v Public Prosecutor* [1980] 2 MLJ 195 memutuskan:

> '… this denial did not cast a doubt on the prosecution case against the Appellant.'

(3) Pembelaan tertuduh tidak menimbulkan was-was yang munasabah (reasonable doubt);

(4) Demeanour tertuduh semasa memberi keterangan meragukan. Keputusan kes Mahkamah Persekutuan *Khoon Chye Hin v Public Prosecutor* [1961] 1 MLJ 105 diikuti mengenai demeanour tertuduh;

(5) Kes prima facie pendakwaan kekal teguh terhadap tertuduh. Pendakwaan telah membuktikan kesnya melampau keraguan yang munasabah terhadap tertuduh;

(6) Tertuduh didapati bersalah dan disabitkan seperti yang diperuntukkan oleh s 182A Kanun Tatacara Jenayah.

[6] Before us learned counsel for the appellant raised the following three issues:

(a) the learned judge failed to direct his mind to the failure of the prosecution to call the appellant's three children as witnesses;

(b) the learned judge's finding that the appellant's demeanour at the time he testified raised suspicion; and

(c) the learned judge failed to make an affirmative finding of possession.

[7] Learned counsel for the appellant submitted that the learned judge had failed to consider the evidence of SP4 that the room where the drugs were found was accessible not just to the appellant but also to SP4 and their children. The prosecution had also failed to call the appellant's children as witnesses with regard to the issue of access to the room. Counsel submitted that the failure of the prosecution to call the appellant's children as witnesses had created gaps in the prosecution's case regarding the issue of possession. It was also submitted

that the learned judge's failure to properly direct his mind to the evidence regarding access to the room was a serious error which amounted to a misdirection by way of non direction. In support learned counsel referred to the case of *Ti Chuee Hiang v Public Prosecutor* [1995] 2 MLJ 433; [1995] 3 CLJ 1 and *Shah Rizan bin Sulong lwn Pendakwa Raya* [2012] MLJU 356; [2012] MLRA 270. Learned DPP on the other hand submitted that the non-calling of the appellant's children was immaterial as the prosecution did not rely on their evidence but on other evidence. In support of her submissions the learned DPP relied on the case of *Teoh Hoe Chye v Public Prosecutor; Yeap Teong Tean v Public Prosecutor* [1987] 1 MLJ 220; [1987] CLJ (Rep) 386. It is further submitted that the appellant's children were offered to the defence.

[8] We find from the evidence adduced by the prosecution that though the room where the drugs were found was occupied only by the appellant and SP4 but it is pertinent to note that evidence also showed that the room was accessible to all the other occupants in the house. SP4 testified that she and the appellant occupied the main bedroom and the children occupied the other two rooms. In cross-examination SP4 agreed that everybody in the house had access to the room (p 28 appeal record). The room was unlocked. Thus whilst the occupants of the room were the appellant and SP4 both of whom would have had complete access to the room, it is also apparent that their three children too had access to the room. Yet SP4 was not charged although she was remanded.

[9] We find that the testimony of SP4 regarding access to the room was hardly challenged. SP5 under cross-examination had also agreed that the appellant's children probably had access to the appellant's room. He was not re-examined on this issue. We agreed with learned counsel that the learned judge had failed to analyse or assess these testimonies. The prosecution has failed to discharge its bounden duty of excluding access to the appellant's room by others.

[10] With regard to the failure of the prosecution to call the appellant's children to testify, we agree with learned DPP that the prosecution has a complete discretion as to the choice of witnesses to be called at the trial. In *Ti Chuee Hiang v PP* the Federal Court held, inter alia:

> … while the prosecution has a complete discretion as to the choice of witnesses to be called at the trial, it also has a duty to call all of the necessary witnesses to establish proof against the accused beyond all reasonable doubt, and if, in the exercise of its discretion, it fails to fulfill this obligation, which is nothing less than a statutory duty, the accused must be acquitted.

Learned DPP had submitted that the children were offered to the defence. However in *Low Kian Boon & Anor v PP* [2010] 4 MLJ 425 ; [2010] 5 CLJ 489 the Federal Court said, inter alia, that the right of not calling a witness by

merely offering him to the defence will not be available where the prosecution evidence falls short of proving a prima facie case.

[11] Having perused the evidence, in our considered opinion the failure to call the appellant's children as witnesses would not have had a material effect on the prosecution's case. It would be reasonable to assume that had the children been called their testimonies regarding access to the room would in all probability be similar to the evidence of SP4 that the room was accessible to all occupants in the house.

[12] On the issue of the appellant's demeanour, learned counsel had submitted that the learned judge had failed to state in his grounds of judgment what were the factors that led him to find that the appellant's demeanour was suspicious. We have perused the grounds of judgment but we were unable to find any notation of the evaluation of the appellant's demeanour by the learned judge that led the learned judge to conclude that the appellant's demeanour was 'suspicious'. In fact no reasons were advanced by His Lordship. We are constrained to produce part of the judgment of Ismail Khan J in *Balasingham v Public Prosecutor* [1959] 1 MLJ 193 referred to by learned counsel wherein His Lordship said, inter alia, as follows:

> The trial court is under a statutory obligation under s 308 of the Criminal Procedure Code to transmit to the Appellate Court the grounds of decision which convey to my mind a reasoned judgment on the facts and the law not merely the conclusion arrived at. The advantage of a speaking judgment needs no emphasis. In fact in *Murugiah v Public Prosecutor and Public Prosecutor v Low Toh Seng* both Home J and Terrell Ag CJ felt that the absence of reasons indicates the possibility that such vital consideration as the weight of evidence and the possibilities of the case may not have influenced the mental process of the trial judge in arriving at the ultimate finding.

In *Dato' Seri Anwar Ibrahim v Public Prosecutor* [2010] 6 MLJ 585; [2010] 9 CLJ 625 Arifin Zakaria, CJM (as His Lordship then was) said '… as a general rule, it is incumbent upon the court making a decision to provide reasons for its decision as litigants are entitled to the same'.

[13] The learned judge's finding on the demeanour of the appellant was one of the factors that weighed on his decision to convict the appellant but we find that it was a finding that was arrived at with no supportive reasons. We respectfully adopt what Ismail Khan J said in *Balasingham v Public Prosecutor* that a conclusion arrived at in the absence of reasons raises the possibility that the learned judge may not have considered the weight of evidence and the possibilities of the case in coming to his ultimate decision.

[14] Learned counsel further raised the issue that the learned judge had failed

A to make an affirmative finding of possession. At the risk of repetition, at the end of the prosecution case, the learned judge said amongst others as follows:

> Mengenai isu kedua, dari keterangan SP4, jelas dia tiada pengetahuan dengan dadah tersebut. Bilik utama itu digunakan oleh beliau dan tertuduh sahaja. Anak-anaknya duduk di bilik yang berasingan. Dadah itu ditemui di kepala katil tempat tidur tertuduh. Oleh itu, tertuduh mempunyai kawalan dan milikan terhadap dadah tersebut. Dengan itu, anggapan di bawah s 37(da)(vi) Akta Dadah Berbahaya 1952 terpakai terhadap tertuduh. Tertuduh dianggap mengedar dadah tersebut.

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Thus the finding that the appellant had custody and control over the drugs and C hence presumed to have possession was based on the fact that:

(a) only the appellant and his wife occupied the room; and

(b) the drugs were found in the drawer of the headboard of the bed where the appellant slept.

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[15] In *Ibrahim Mohamad & Anor v Public Prosecutor* [2011] 4 CLJ 113 the Federal Court said:

> It is trite law that possession is an important ingredient in the charge of trafficking. E Unless there is direct evidence of trafficking, the prosecution must prove the ingredient of 'possession' and the trial judge must make an affirmative finding of 'possession' before the presumption of trafficking under s 3(da) of the Act can be invoked.

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[16] The evidence showed that the drawer was closed thus the bag P8 was not visible. There was no evidence that the drawer was locked. The onus was on the prosecution to exclude, at the very least, the possibility of access by other persons to the drawer, if not the room, and that only the appellant and no other person had exclusive access and use of the drawer. The onus was not on the G defence to prove possibility of access to the drawer by others. We find that the learned judge had failed to consider that the prosecution had failed to exclude the possibility that other individuals could not have had access to the drawer. In *Leow Nghee Lim v Rex* [1956] MLJ 28; [1955] 1 LNS 53 Taylor J dealt with the issue of possession as follows:

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> A man must know of the existence of a chattel and have some idea of its whereabouts before he can exercise any control over it. The word possession therefore implies some knowledge but not necessarily full or exact knowledge.

I His Lordship said further:

> The word 'possession' is a vague and general word which cannot be closely defined.
>
> Without at least general knowledge there cannot be possession but there can be possession without full and exact knowledge.

[17] On the evidence the learned judge did not specifically make a finding of actual possession for the invocation of the statutory presumption of trafficking under s 37(da) of the Act. In the absence of other incriminating evidence against the appellant, the mere fact that the drugs were found in the drawer on the appellant's side of the bed was insufficient for the learned judge to make an inference that the appellant had exclusive custody and control over the bag P8. We agreed with learned counsel that the failure on part of the learned judge to properly consider and evaluate the evidence coupled with His Lordship's failure to make an affirmative finding of possession was a serious misdirection in law.

[18] Be that as it may, the learned judge had called on the appellant to enter his defence. It is trite that all that is necessary is for the appellant in his defence to cast a reasonable doubt in the prosecution's case to earn an acquittal. The appellant's defence is a denial. In *Mohamad Radhi Yaakob v Public Prosecutor* [1991] 3 MLJ 169; [1991] 3 CLJ 2073; [1991] 1 CLJ 311 (Rep) the Supreme Court held, inter alia, as follows:

> Whenever a criminal case is decided on the basis of the truth of the prosecution case as against the falsity of the defence story, a trial judge must in accordance with the principle laid down in *Mat v Public Prosecutor* [1963] 1 LNS 82 examine whether even though the court is not satisfied with the defence story, to ask whether in spite of this, the defence story casts a reasonable doubt on the prosecution case. To satisfy this test, of importance is not the words used by the judge but rather the actual application of the test to the facts of the case. In this case, the learned judge offered practically no reason why the defence notwithstanding its falsity and unconvincing nature, had failed to cast a reasonable doubt on the prosecution case, other than to state by way of lip service the duty placed by the law on the defence to earn an acquittal.

[19] The learned judge had set out the defence (p 91 appeal record). However we find that the defence as set out was not with a view of assessing it nor is there any indication that the learned judge had tested the defence by comparing it with the evidence adduced by the prosecution in coming to his conclusion that the defence had failed to cast a reasonable doubt on the prosecution case.

[20] The burden on the prosecution throughout is to prove their case beyond a reasonable doubt. At the end of the prosecution's case the test is 'prima facie case' based on a maximum evaluation of evidence. In *Magendran a/l Mohan v PP* [2011] 6 MLJ 1; [2011] 1 CLJ 805 Alauddin Mohd Sheriff PCA said:

> The test at the end of the prosecution's case is 'prima facie case' based on a maximum evaluation of evidence. The evidence has to be scrutinised properly and not perfunctorily, cursorily or superficially. If the evaluation of the evidence results in doubts in the prosecution's case, then a prima facie case has not been made out. The defence ought not to be called merely to clear or clarify such doubts.

A In the present appeal it is our considered opinion that had the learned judge properly evaluated the evidence adduced by the prosecution, he would have come to a finding that the prosecution had failed to prove beyond a reasonable doubt that the appellant had custody or control of the bag containing the drugs in question for the presumption under s 37(da) of the Act to be invoked. We
B were of the view that the appellant ought not to have been called to enter his defence.

[21] It is the duty of the appellate court to step in where errors of law are apparent on the face of the record which resulted in serious and substantial
C miscarriage of justice to the accused. In the present appeal we find that the balance of evidence is grossly against the conviction of the accused. For the reasons stated above we allowed the appellant's appeal and set aside the conviction and sentence. The appellant was thereupon acquitted and discharged.

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Appeal allowed, conviction and sentence set aside and accused acquitted and discharged.

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Reported by Ashok Kumar

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